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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1969~~ 1971

No. ~~58~~ 14

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPELLEE

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STATE OF NORTH CAROLINA,

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BRIEF FOR APPELLEE

Questions Presented

I. IS THE NORTH CAROLINA STATUTORY SCHEME FOR IMPOSITION OF THE DEATH PENALTY UNCONSTITUTIONAL UNDER THE DECISION OF *United States* v. *Jackson*, 390 U.S. 570 (1968)?

II. IS THE APPELLEE ENTITLED TO RELIEF UNDER THE DECISION OF *United States* v. *Jackson* EVEN THOUGH HE PLEADED GUILTY TO SECOND DEGREE MURDER RATHER THAN TO THE CAPITAL OFFENSE FOR WHICH HE WAS INDICTED?

III. Should the Decision of *United States* v. *Jackson* Be Given Retroactive Effect?

IV. Was the Appellee's Plea of Guilty Involuntary and Therefore Invalid?

Constitutional and Statutory Provisions Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 15-162.1 (repealed 1969) and 14-17 of the General Statutes of North Carolina are set out in the Appendix, p. 47.

Statement of the Case

In addition to those matters which are set out in the brief for the appellant under the heading "Statement of the Case," the following facts are material to the questions presented in this appeal.

At approximately one o'clock a.m. on November 23, 1963, Henry C. Alford was arrested in Winston-Salem, North Carolina, in connection with the death of Nathaniel Young, which had occurred the evening before. At the December

2, 1963, Term of Superior Court of Forsyth County, North Carolina, Alford was indicted for murder in the first degree, and Fred G. Crumpler of the Winston-Salem bar was appointed as his counsel by the court. On December 10, 1963 Alford pleaded guilty to second degree murder and was sentenced to the maximum sentence allowable for that offense, thirty years in the North Carolina State Prison.

According to the testimony of the investigating officer at Alford's trial, Alford, who is a Negro, and his white female companion had been in the home of Young, also a Negro, shortly before the murder. Alford, Young, and a third Negro man had a disagreement about whether Alford's female companion would leave with him or remain at the house. Alford grabbed the woman's coat and left, pursued by the other two men, who returned shortly thereafter. Ten or fifteen minutes later, there was a knock on the door, and, when Young opened the door slightly, he was shot. No one actually saw who fired the shot. The police apparently obtained statements from various persons who claim to have heard Alford make incriminating statements. They also located a gun in Alford's home, but investigation of the gun did not show that it had been fired recently.

On a number of occasions Alford and his attorney discussed what Alford's plea should be to the charge against him. The attorney testified at the state post-conviction hearing that he advised Alford that he had a right to plead not guilty and of the various verdicts which could be returned by the jury in that event. He further advised Alford that with the evidence that the state had, in his opinion he could not win the case and that he thought it would be in Alford's best interest to plead guilty to some offense of homicide rather than to stand trial on a first degree murder charge. The attorney told Alford that he

did not think the jury would look favorably upon the case because the facts were aggravated. The attorney also discussed the matter with Alford's sister and others, and they, too, advised him to plead guilty. According to the attorney's testimony, Alford told the attorney that he was not guilty, but at their last conference Alford told him that he would plead guilty to second degree murder. (Supplement to Record on Appeal, C.A. 4, No. 10,391, p. 26½, Proceedings of Post Conviction Hearing, pp. 4, 8 and 14.)

At the trial, the attorney entered a plea of guilty to second degree murder. After the state and the defendant had presented witnesses, the defendant's attorney stated that the defendant wished to take the stand. Alford related his version of what happened on the night of the murder and then said:

> " . . . I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all." (A. 7)

Alford's attorney then established by questioning Alford that he had advised Alford of his rights and of the possible results if he pleaded not guilty, and that Alford had authorized him to tender a plea of guilty. Alford then said:

> "Well, I'm still pleading that you all got me to plead guilty. I plead the oher way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty." (A. 8)

The court then asked Alford if it was still his desire to plead guilty to second degree murder, and Alford replied:

> "Yes sir, I plead guilty on—from the circumstances that he told me." (A. 9)

The court pursued this line of questioning no further.

During the State post-conviction hearing Alford reasserted his innocence, and his attorney at the original trial and Alford's sister testified to the effect that Alford has always contended that he was innocent but that he was pleading guilty because he did not want to risk the death penalty. (Supplement to Record and Appeal, C.A. 4, No. 10,391, p. 26½, Proceedings of Post Conviction Hearing, pp. 8, 14 and 24; A. 39, 40, n. 21.)

ARGUMENT

I.

The North Carolina Statutory Scheme for Imposition of the Death Penalty Is Unconstitutional Under the Decision of United States v. Jackson, 390 U.S. 570 (1968).

In *United States* v. *Jackson,* 390 U.S. 570 (1968), this Court held that the death penalty clause in the Federal Kidnaping Act constitutes an "impermissible burden upon the assertion of a constitutional right." Under the Act, the punishment for kidnaping, if the kidnaped person has not been liberated unharmed, is imprisonment for a term of years or for life, or death if the jury shall so recommend. Thus, under the Act only the jury could impose the death penalty, and a defendant charged under the Act could avoid the possibility of capital punishment, by pleading guilty or by pleading not guilty and waiving his

right to a jury trial. This Court held in *Jackson* that a death penalty which is applicable only to those defendants who assert the right to contest their guilt before a jury discourages a defendant's assertion of his Fifth Amendment right not to plead guilty and deters his exercise of his Sixth Amendment right to demand a jury trial.

Under the North Carolina statutory scheme for imposition of the death penalty, the penalty for each capital crime is death unless the jury recommends that the punishment be imprisonment for life. (A. 47-48) If the defendant pleads guilty and his plea is accepted by the Court, the mandatory punishment is life imprisonment. The United States Court of Appeals for the Fourth Circuit correctly held in *Alford* v. *North Carolina,* 405 F.2d 340 (1968) (A. 27), that in all material respects the North Carolina statutory scheme (A. 47-48) is identical to that declared unconstitutional in *United States* v. *Jackson, supra,* and is, therefore, in violation of the Fourteenth Amendment right of due process, which includes the right to plead not guilty, *e.g., Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956), and the right of trial by jury. *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).

The State of North Carolina has argued in its brief that the North Carolina statutory scheme is different from that condemned in *Jackson* because under the North Carolina statutes, the jury is given the right to mitigate the penalty for capital crimes, whereas under the Federal Kidnaping Act the jury is given authority to extend the penalty to include death. The State further argues that the two statutory schemes are distinguishable because their legislative histories are dissimilar, for the Federal Kidnaping Act originally contained no provision for capital punishment, whereas the North Carolina statute imposed the death

penalty automatically for capital crimes until 1949, when the alternative of life imprisonment was enacted

The constitutional infirmity of the penalty provisions of the Federal Kidnaping Act existed because of the effect which those provisions have upon a person charged under the Act. The effect of the North Carolina statutory scheme for imposition of the death penalty upon one accused of a capital crime is identical. In each instance, the defendant faces the awesome decision of whether to risk the possibility of the death penalty or to waive his right to have his guilt determined by a jury. Indeed, the North Carolina scheme is even more objectionable than that prescribed by the Federal Kidnaping Act, for in North Carolina the defendant in a capital case must risk the death penalty in order to assert his innocence at all since in North Carolina a defendant who pleads not guilty cannot waive his right to a jury trial and be tried by a judge. *State* v. *Muse,* 219 N.C. 226, 13 S.E.2d 229 (1941); *State* v. *Hill,* 209 N.C. 53, 182 S.E. 716 (1935). Thus, the North Carolina defendant, in order to avoid the possibility of capital punishment, must waive not only his right to a trial by jury, but also his right to a trial to determine his guilt and consequently his right to confront and cross-examine witnesses against him as established in *Pointer* v. *Texas,* 380 U.S. 400 (1965).

In his dissent in the case of *State* v. *Spence,* 274 N.C. 536, 545, 164 S.E.2d 593, 598 (1968), Justice Bobbitt of the North Carolina Supreme Court, in comparing the North Carolina statutory scheme for imposition of the death penalty with that of the Federal Kidnaping Act, noted: "If there by any real difference, it would seem that the pressure upon a defendant to enter a plea that will avoid 'the risk of death' would be greater under our statutes." *Id.* at 553, 164 S.E.2d at 603. Likewise, the Supreme Court of

South Carolina could find no distinction between its statutory scheme, which is virtually identical to that of North Carolina, and that declared unconstitutional in *United States* v. *Jackson*. *State* v. *Harper*, —— S.C. ——, 162 S.E.2d 712 (1968). It is submitted that since the effect of the North Carolina statutory scheme upon the accused is the same as that of the Federal Kidnaping Act, the intention of the North Carolina legislature in constructing that statutory scheme, no matter how charitable and well meaning, is irrelevant.

Nor is the semantic distinction which the State has attempted to make with regard to whether the jury's authority is to mitigate the penalty or to impose a more severe penalty significant. What is relevant and significant is that the statutory scheme for imposing the death penalty in North Carolina has a "chilling effect" upon the assertion by the accused on his rights not to plead guilty and to demand a jury trial under the Fourteenth Amendment and "needlessly encourages" him to plead guilty. *United States* v. *Jackson, supra,* 390 U.S. at 582 and 583. That such a scheme of punishment has the effect which this Court surmised that it has in its opinion in *Jackson* is vividly established by the record in the case now before this Court, which effectively demonstrates that the only reason for Alford's guilty plea was his fear that he might receive the death penalty if he allowed his guilt or innocence to be determined by a jury.

II.

The Appellee Is Entitled to Relief Under the Decision of United States v. Jackson Even Though He Pleaded Guilty to Second Degree Murder Rather Than to the Capital Offense for Which He Was Indicted.

The State has argued that the *Jackson* decision is not applicable to the case now before the Court because Alford pleaded guilty to second degree murder rather than to first degree murder, the capital crime for which he was indicted. Alford was never given the option of pleading not guilty to a lesser offense. His choice was either to plead not guilty to a capital offense or to plead guilty and avoid risking the death penalty. It is obvious from the record that the paramount factor in this decision was Alford's desire not to risk the possibility of capital punishment, not the prospect of being permitted to plead guilty to a lesser offense. Whether his sentence was life imprisonment, as it would have been had he pleaded guilty to first degree murder, or thirty years imprisonment, which he received for pleading guilty to second degree murder, could not have been significant to his decision. In rejecting this argument, the Fourth Circuit said:

> "It is immaterial in our view that petitioner pleaded guilty to murder in the second degree rather than to murder in the first degree under which he was charged. For all that appears in the record, the state had not surrendered its right to prosecute petitioner for first degree murder until the time when he agreed to plead guilty to second degree murder. Of course, if the state had determined that it would only prosecute for second degree murder, *and this fact had been known to*

> *the petitioner before his plea was entered,* then it could hardly be maintained that his guilty plea was a product of a fear of the death penalty. To us the *Jackson* defect in the North Carolina statutes potentially infects the validity of the acceptance of a plea of guilty to any lesser included offense. This is not to say, however, that where, as here, the plea is accepted to a lesser included offense, there is not a higher burden of proof upon one attacking the judgment entered thereon to show that the plea was the result of an invidious consideration than if the plea were to the degree of the crime which would support capital punishment. The very process of downgrading the charge may well suggest that the plea was motivated by factors other than a fear of death; certainly, it is circumstantial evidence that punishment by death was not a substantial possibility in view of the prosecutor's acquiescence in significant concessions. From a strictly evidentiary standpoint, we think this case is not the ordinary one and petitioner has met the burden of proof placed on him."
>
> 405 F.2d at 347 n. 17. (A. 37-38) (Emphasis the Court's.)

Chief Judge Haynsworth's primary concern in his dissent in *Alford* v. *North Carolina, supra,* was that the majority seemed to disapprove plea bargaining, which Judge Haynsworth considers "both useful and desirable in the administration of justice." 405 F.2d at 350. (A. 43) It is submitted that the record in the present case amply demonstrates that plea bargaining had no effect on Alford's decision to plead guilty. However, even if Alford was plea bargaining, it is submitted that such bargaining is impermissible under the reasoning of this Court in *Jackson.*

See *Shelton* v. *United States*, 242 F.2d 101 (5th Cir. 1957); *Shelton* v. *United States*, 246 F.2d 571 (5th Cir. 1957), rev'd, 356 U.S. 26 (1958). What *Jackson* requires is for the penalty for a single offense to be uniform, whether the defendant pleads guilty or not guilty and whether or not he waives his right to a jury trial. It is apparent that plea bargaining encourages a defendant to plead guilty and waive his right to a jury trial, and, thus, accomplishes the very result which was condemned as unconstitutional in *Jackson*.

In any event, plea bargaining should never be permitted where a defendant consistently proclaims his innocence and declares that he is submitting his guilty plea only to avoid a more severe penalty. "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiation must be limited to the quantum of punishment for an admittedly guilty defendant." *Bailey* v. *MacDougall*, 392 F.2d 155, 158 n. 7 (4th Cir. 1868). Alford has never been "admittedly guilty." In fact, he has consistently asserted his innocence and, indeed, at the trial itself denied any guilt. In the face of such denial, the trial judge made no real inquiry into the matter and did not attempt to ascertain from the defendant whether he was guilty. (A. 5-11) Alford's plea cannot be upheld on the ground that it was the result of plea bargaining.

III.

The Decision of United States v. Jackson Should Be Given Retroactive Effect.

Alford was tried and sentenced before this Court decided the *Jackson* case. The State has argued that *Jackson* should be declared by this Court to be prospective only in application and that Alford is, therefore, not entitled to relief. It is submitted, however, that the principles involved and the rights protected in the *Jackson* decision necessitate a conclusion that the decision must be given retroactive effect.

This Court's recent decisions that have significantly redefined the rights of the accused under the Constitution of the United States have necessitated a consideration of the problem of retroactivity. A reading of the cases considering the problem indicates that where the purpose of a decision is to require law enforcement officials to comply with the provisions of the Constitution or of federal law, the Court has held that the effect of the decision will be prospective only, for the result of violation of the rights involved in such decisions seldom raises a serious question as to the validity of the decision of guilt or innocence or deprives the accused of a fair trial. Where, however, the existence of the constitutional infirmity involved casts substantial doubt on the correctness of the determination of the accused's guilt or innocence or has effectively denied the accused a fair trial, the Court has held the decision to have retroactive application, considering these fundamentals—a fair trial and a reliable verdict—to outweigh all other relevant considerations.

Thus, a number of decisions involving actions of law enforcement officials before trial itself have been held to

be prospective only in application. In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), this Court held that the rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), making inadmissible at trial evidence obtained by unreasonable searches and seizures would be applied prospectively only. The Court's purpose in excluding such evidence was not that it was unreliable. On the contrary, such evidence would likely be as reliable as any other. Rather, the Court's aim was to force law enforcement officials to respect an accused's right to be free from unreasonable searches and seizures by assuring that no profit would be gained by violating such right. Likewise, in *Fuller* v. *Alaska*, 393 U.S. 80 (1968), the Court held prospective only the rule set out in *Lee* v. *Florida*, 392 U.S. 378 (1968), that evidence obtained in violation of Section 605 of the Federal Communications Act, 48 Stat. 1964, 1103, 47 USC §605, is not admissible at trial. And in *Desist* v. *United States*, 394 U.S. 244 (1969), the exclusionary rule announced in *Katz* v. *United States*, 389 U.S. 347 (1967), precluding from evidence the fruits of warrantless electronic eavesdropping was held to be nonretroactive. As in *Mapp* v. *Ohio, supra*, the purpose of the decisions in *Lee* and *Desist* was not to enhance the reliability of the determination of guilt or innocence but to force compliance with the law.

In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), this Court, in holding that *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), decisions concerned with the pretrial questioning process, would not be retroactively applicable, pointed out: "Our opinion in Miranda makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice." *Id.* at 729. The Court was not

concerned with the reliability of the statements made by accused persons and admitted into evidence in pre-*Miranda* trials, pointing out that if a confession was in fact coerced, the accused is entitled to relief in any event.

Similarly, the right of counsel during pretrial confrontation of witnesses for identification purposes as expounded in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967), has been held by this Court to be nonretroactive. *Stovall* v. *Denno,* 388 U.S. 293 (1967). The reasoning of the *Stovall* decision was substantially that expressed by the Court in *Johnson* v. *New Jersey, supra.* The accuracy of the identification and the fairness of the accused's trial are not substantially lessened by the absence of counsel during pretrial confrontation of witnesses, but counsel is a privilege which should be enforced under an adversary system of justice.

Recently, the Court has held the application of the Sixth Amendment right to a jury trial to the states through the Fourteenth Amendment to be prospective only. *De Stefano* v. *Woods,* 392 U.S. 631 (1968). The Court held that trials by judges rather than by juries are not necessarily unfair and that the reliance by law enforcement officials on the constitutionality of the former practice and the effect upon the administration of justice of the application of the new ruling to all trials in which a jury had not been permitted outweighed the possibility of some unreliability in verdicts in criminal contempt cases.

On the other hand, this Court has consistently held that where the "very integrity of the fact-finding process," *Linkletter* v. *Walker, supra,* 381 U.S. at 639, is challenged by the constitutional defect so that there exists "the clear danger of convicting the innocent," *Tehan* v. *United States*

ex rel. Shott, 382 U.S. 406, 416 (1966), and where violations of the constitutional right involved "almost invariably deny a fair trial," *Stovall* v. *Denno*, *supra*, 388 U.S. at 297, application of the constitutional principle enunciated will be retroactive.

Thus, the right of counsel at trial as established in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the requirement that indigent defendants who appeal be furnished transcripts by the state, the defendant's right of confrontation and cross-examination of witnesses as outlined in *Pointer* v. *Texas*, 380 U.S. 400 (1965) and *Barber* v. *Page*, 390 U.S. 719 (1968), the right to have coerced confessions excluded from consideration of the jury under *Jackson* v. *Denno*, 378 U.S. 368 (1964), the defendant's right to counsel on appeal, the right to counsel when an accused pleads guilty, the right to counsel at a hearing concerning revocation of probation and imposition of a deferred sentence, the right to have a co-defendant's inculpatory statements excluded from consideration of the jury, and the right of one accused of a capital crime not to have excluded from the jury all persons who have conscientious qualms against the death penalty have all been held to be retroactive in effect. See *Burgett* v. *Texas*, 389 U.S. 109 (1967), and *Doughty* v. *Maxwell*, 376 U.S. 202 (1964) (right of counsel at trial); *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958), and *Brookhart* v. *Janis*, 384 U.S. 1 (1966) (confrontation and cross-examination per *Pointer* v. *Texas*, *supra*); *Berger* v. *California*, 393 U.S. 314 (1969) (confrontation and cross-examination per *Barber* v. *Page*, *supra*); *Nerlin* v. *Denno*, 378 U.S. 575 (1964) (coerced confessions); *Smith* v. *Arizona*, 389 U.S. 10 (1967), and *Anders* v. *California*, 386 U.S. 738 (1967) (right to counsel on appeal); *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968) (right to counsel when

guilty plea tendered); *McConnell* v. *Rhay*, 393 U.S. 2 (1968) (right to counsel at revocation of probation hearing); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (exclusion of co-defendant's inculpatory statements); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (nonexclusion of jurors with qualms against capital punishment). See generally, *Linkletter* v. *Walker*, *supra*, 381 U.S. at 628 n. 13.

In *Stovall* v. *Denno*, *supra*, 388 U.S. at 297, this Court set out the factors to be considered in making the determination of whether or not a decision has retroactive effect:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

The State has argued that this Court's decision in *United States* v. *Jackson*, *supra*, should not have retroactive effect because law enforcement authorities have relied upon the presumed constitutionality of the punishment scheme condemned in *Jackson* and because to hold the decision retroactive would mean a disruption of court calendars and the necessity for retrials in cases where evidence is no longer available.

This Court has said, however: "Foremost among these factors [those enunciated in *Stovall*] is the purpose to be served by the new constitutional rule." *Desist* v. *United States*, *supra*, 394 U.S. at 249. Where the purpose is to insure a fair trial and a reliable verdict, and where the violation of the constitutional right enunciated is likely to deny an accused a fair trial and cast serious doubt upon

the accuracy of the verdict, considerations of reliance by law enforcement authorities and the effect of retroactivity upon the administration of justice are given little weight. For example, it is difficult to imagine a greater impact on the administration of justice than was wrought by the retroactivity of *Gideon* v. *Wainwright, supra.* Nevertheless, this Court held that the right to counsel at trial is so necessary to the assurance of a fair trial that retroactive application could not be denied.

A statement of the factors to be considered make it evident that the holding of *United States* v. *Jackson, supra,* should be given retroactive effect. For the effect of encouraging an accused to plead guilty by offering him an alternative to the risk of the death penalty is not merely to deny him a fair trial, as in the *Gideon* situation, but to deny him a trial at all, for a plea of guilty is tantamount to conviction.[1] Under our system of justice, where the ultimate goal is to afford every man a fair trial, to allow a man to be pressured and psychologically coerced into foregoing his right to a trial is unconscionable.[2] Furthermore, when one considers the awesome decision with which a man who is charged with a capital crime in North Carolina is faced and the terrible gamble he must take in order

[1] "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927).

[2] Under the Federal Kidnaping Act, an accused could also avoid the possibility of the death penalty by pleading not guilty and waiving a jury trial. Under the North Carolina statutes, that option is not available. The issue before the Court, therefore, is the retroactivity of *Jackson* to the extent a comparable statutory scheme forces the accused either to plead guilty or to risk capital punishment.

to have his guilt or innocence determined by a jury, it seems likely that, if he can avoid the gamble by pleading guilty, there is a strong possibility that he will plead guilty in order to preserve his life, despite his innocence, if the state has evidence which tends to incriminate him. Moreover, by yielding to the temptation of avoiding the possibility of the death penalty, the accused is forced to forfeit his right to confront and cross-examine his accusers, a right considered so fundamental by this Court that it has been given retroactive effect. *Brookhart* v. *Janis, supra; Berger* v. *California, supra.* The statement of this Court in *Witherspoon* v. *Illinois, supra,* 391 U.S. at 523 n. 22 is very apt to the situation now before the Court:

> "But we think it clear, Logan notwithstanding, that the jury-selection standards employed here necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate, . . . and we have concluded that neither the reliance of law enforcement officials, . . . nor the impact of a retroactive holding on the administration of justice, . . . warrants decision against the fully retroactive application of the holding we announce today."

IV.

The Appellee's Plea of Guilty Was Involuntary and Was Therefore Invalid.

Even if this Court's decision in *United States* v. *Jackson, supra,* is not given fully retroactive effect, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed because Alford's plea of guilty was involuntary. It is well settled that a plea of guilty which is not entirely voluntary is void. *E.g., Machibroda* v. *United States,* 368 U.S. 487 (1962); *Shelton* v. *United States,* 356 U.S. 26 (1958); *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948); *Waley* v. *Johnston,* 316 U.S. 101 (1942); *Walker* v. *Johnston,* 312 U.S. 275 (1941).

Even where this Court has refused to give newly enunciated constitutional rights retroactive effect, it has recognized that in cases where the facts show a fundamental violation of due process, a defendant is nevertheless entitled to relief. In *Stovall* v. *Denno, supra,* in which this Court declared that the right of counsel at pretrial confrontations with witnesses for identification purposes would be prospective only, the Court discussed the question of retroactivity as follows:

> "Therefore, while we feel that the exclusionary rules set forth in Wade and Gilbert are justified by the need to assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present. Of course, we should also assume there have been injustices in the past

> which could have been averted by having counsel present at the confrontation for identification, just as there are injustices when counsel is absent at trial. But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application, especially in light of the strong countervailing interests outlined below, and because *it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law.* See Palmer v. Peyton, 359 F.2d 199 (CA 4th Cir. 1966)." 388 U.S. at 299. (Emphasis added.)

In *Davis* v. *North Carolina,* 384 U.S. 737 (1966), decided on the same day that *Johnson* v. *New Jersey, supra,* held *Escobedo* v. *Illinois, supra,* and *Miranda* v. *Arizona, supra,* to have nonretroactive application, the Court held that the petitioner Davis' confession was involuntary and that the absence of the warnings required by *Miranda* was "a significant factor in considering the voluntariness of statements later made." *Id.* at 740. This Court further stated that it had a duty "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Id.* at 741-42.

A reading of the record in the case now before this Court leads to the inescapable conclusion that Alford's plea of guilty was in fact involuntary. The United States Court of Appeals for the Fourth Circuit so found:

"While *Jackson* clearly stands for the proposition that the death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty, it falls short of holding that the North Carolina statutory provisions for the imposition of capital punishment are in themselves inherently coercive. In *Jackson* the Court stated that the mere fact that an accused had pleaded guilty to a charge under the Federal Kidnaping Act did not necessarily render his plea involuntary and require reversal of his conviction.

"By a parity of reasoning, we think that a defendant who has pleaded guilty when charged with a capital offense in North Carolina is not necessarily entitled to post-conviction relief as a matter of law. *Jackson* by defining what are the impermissible burdens of a statutory scheme like that of North Carolina must be read, however, to hold that a prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens—specifically, that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. *Jackson* thus defined a new factor to be given weight in determining the voluntariness of a plea—a factor present in full measure in the instant case because of the North Carolina statutory scheme. As we read *Jackson,* we must determine the extent to which, if at all, petitioner was moved to plead guilty because of the incentive which the North Carolina statutory scheme supplied to achieve that result.

"In light of the principles we distill from *Jackson,* we have no hesitancy in concluding from our examination of the record that petitioner's plea of guilty was

made involuntarily, and that petitioner is entitled to relief by habeas corpus."

Alford v. *North Carolina, supra,* 405 F.2d at 346-47. (A. 36-38) (Footnotes and roman numerals omitted.)

The Fourth Circuit thus held, in accordance with this Court's decision in *Davis* v. *North Carolina, supra,* that newly enunciated constitutional principles may be considered as relevant factors in determining whether a plea of guilty was in fact involuntary.

The record in the present case overwhelmingly establishes that Alford's only reason for pleading guilty was to avoid risking the possibility of the death penalty. At the trial itself, Alford took the stand at his own request and, after relating his version of what had happened on the night of the murder, said:

"... I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all." (A. 7)

After Alford testified, in response to questioning by his attorney, that he had authorized the plea, he reiterated:

"Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty." (A. 8)

And when the court asked Alford if it was still his desire to plead guilty, he replied:

> "Yes sir, I plead guilty on—from the circumstances that he told me." (A. 9)

According to the testimony presented at the state post-conviction hearing, Alford consistently asserted his innocence prior to his trial and agreed to plead guilty with great hesitancy and only after his attorney had informed him that in his (the attorney's) opinion Alford would receive the death penalty if he pleaded not guilty and was tried before a jury, and only after his sister and other friends urged him to plead guilty because pleading guilty would be better than risking the death penalty. (Supplement to Record on Appeal, C.A. 4, No. 10,391, p. 26½, Proceedings of Post Conviction Hearing, pp. 8, 14 & 24; A. 39, 40, n. 21)

Furthermore, as the Fourth Circuit noted, "No court has ever found that he [Alford] pleaded guilty other than to avoid possible imposition of the death penalty." 405 F.2d at 348. (A. 38) Judge Haynsworth in his 1966 memorandum decision dismissing an earlier petition filed by Alford, said:

> "The state judge found that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact and I see no reason to disagree with it." (A. 20)

Nothing in the record suggests that Alford has ever deviated from his repeated assertions of his innocence or from his contention that his only reason for pleading guilty was to avoid the possibility of the capital punishment.

In *United States* v. *Jackson*, this Court held the scheme of punishment of the Federal Kidnaping Act unconstitutional because of the possibility of its coercive effect and not because all pleas of guilty entered thereunder are necessarily coerced and involuntary. And it is perhaps arguable that persons entering pre-*Jackson* guilty pleas which were not so coerced are not entitled to relief. Surely, however, any defendant who can demonstrate that his plea of guilty was in fact the sole result of the coercive effect of the statutory scheme of punishment under which he was charged is entitled to relief, for his guilty plea was in fact involuntary. It is difficult to imagine a more obvious case for relief than the case now before this Court.

Conclusion

For the foregoing reasons the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed and the case remanded for issuance of the writ of habeas corpus.

Respectfully submitted,

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